Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

No. 02-1761

IN THE

Supreme Court of the United States

BROSNAHAN BUILDERS, INC., KEVIN BROSNAHAN, and LINDA BROSNAHAN,

Petitioners,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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17 pp

STATEMENT PURSUANT TO RULE 29.6

Respondent Harleysville Mutual Insurance Company has no parent company and no publicly held company owns ten percent or more of its stock.

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COUNTER-STATEMENT OF THE CASE

Petitioners Brosnahan Builders, Inc., Kevin and Linda Brosnahan (collectively "Brosnahan Builders") initiated this insurance coverage declaratory judgment action on March 24, 2000 in the United States District Court for Delaware against Harleysville Mutual Insurance Company ("Harleysville") in which they alleged that Harleysville breached its duty to defend under a commercial general liability ("CGL") insurance policy issued to Brosnahan Builders for construction defect and consumer fraud claims asserted against them in the underlying action, *Pinkert v. Brosnahan Builders, et al.* ("the *Pinkert* Complaint"). In the coverage action, Brosnahan Builders pled claims of breach of the insurance contract, bad faith breach of contract and breach of the contractual duty of good faith and fair dealing against Harleysville.

The parties filed cross-motions for summary judgment on the issue of whether Harleysville breached the duty to defend the underlying action. On March 30, 2001, the district court denied Brosnahan Builders' motion for summary judgment and granted Harleysville's cross-motion for summary judgment. The district court found that the *Pinkert* Complaint did not set forth allegations of "property damage" caused by an "occurrence" as those terms are defined by the insurance policy sufficient to trigger a duty to defend on the part of Harleysville. In the alternative, the district court held that Exclusions k(5) and (n) of the CGL policy applied to bar liability insurance coverage for the lawsuit. As such, the court concluded that Harleysville correctly denied any duty to defend Brosnahan Builders at the outset of the *Pinkert* lawsuit.

Thereafter, Brosnahan Builders moved to amend the judgment pursuant to Fed. R. Civ. P. 59(a) on the basis that Harleysville's subsequent settlement of the *Pinkert* litigation waived the insurer's right to contest the duty to defend from the outset of the *Pinkert* lawsuit. The Rule 59(a) motion was denied on January 18, 2002.

Brosnahan Builders filed a timely appeal to the United States Court of Appeals for the Third Circuit. On January 21, 2003, the Third Circuit affirmed the lower court's holding. Brosnahan Builders' petition for *en banc* review before the Third Circuit was denied on March 5, 2003. This Petition for a Writ of Certiorari ensued.

REASONS FOR DENYING THE PETITION

I. Case Concerns State Law Issues Only – No Reason To Grant Certiorari

Brosnahan Builders' Petition for a Writ of Certiorari seeks review of the Third Circuit's application of Delaware state law to the resolution of an insurance coverage dispute. Petitioner does not identify any constitutional, federal question or other substantive basis meriting the granting of *certiorari*.

This case involves a dispute between an insurer, Harleysville Mutual, and its policyholder, Brosnahan Builders, over whether Harleysville was required to assume the defense of Brosnahan Builders and its owners for liability claims based on their alleged poor construction of a beachfront property. Under Delaware law, the determination of whether a liability insurer is obligated to defend the policyholder is measured by comparing the "four corners" of the Complaint to the insurance policy terms. *Continental Cas. Co. v. Alexis I. DuPont School District*, 317 A.2d 101, 103 (Del. 1974).

In June 1999, the Pinkerts commenced their lawsuit against Brosnahan Builders. Brosnahan Builders tendered the defense of the *Pinkert* lawsuit to Harleysville for a defense. Based on its reading of the *Pinkert* Complaint and the policy coverages, Harleysville concluded that Pinkerts sought recovery of damages based strictly on the policyholder's failure to construct the home in a workmanlike fashion and in conformity with the contract specifications – a liability risk which is not encompassed by the CGL insurance coverages[1]. Harleysville declined to assume the defense.

In July 2002, a third party complaint was filed by Brosnahan Builders against several subcontractors, the allegations of which precipitated Harleysville's decision to assume, on a prospective

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1. The district court correctly held, and the Third Circuit properly affirmed, that the breach of contract claim based on the insured's failure to perform their contractual obligations which necessitated repair work is not a chance, fortuitous or unusual event; rather, the claimed damages naturally flow from failing to follow building specifications. *See Pro Dent v. Zurich Ins. Co.*, 2002 U.S. App. LEXIS 5252 (3d Cir. 2002) (applying Pennsylvania law); *Redevelopment Authority of Cambria County v. International Insurance Co.*, 685 A.2d 581 (Pa. Super. 1996) (*en banc*), *alloc. denied*, 695 A.2d 787 (Pa. 1987); *Erie Insurance Property & Casualty Co. v. Pioneer Home Improvement*, 526 S.E.2d 28 (W. Va. 1999) (no duty to defend insured for faulty installation of siding under a commercial general liability policy as claims arose from breach of contract); *Bor-Son Building Corp. v. Employers Com'l Union*, 323 N.W.2d 58 (Minn. 1982) (finding no duty to defend insured for faulty construction of a high-rise apartment complex where damages arose from breach of contract); *Blaylock & Brown Construction v. AIU Insurance Co.*, 796 S.W.2d 146 (Tenn. App. 1990) (no duty to defend for damages arising out of insured's inadequate construction); *Peerless Insurance Co. v. Brennon*, 564 A.2d 383 (Me. 1989) (no coverage for claims of unworkmanlike construction because they arose from a breach of contract).

basis, the defense of the petitioner. The allegations of the third party complaint suggested the possibility that a subcontractor's negligence may have accidentally damaged other components of the building. While the insured general contractor is not insured for the cost of remedying the poor workmanship of its subcontractor, if a subcontractor negligently damages other contractor's work, then the "subcontractor exception" to the workmanship exclusion of the CGL policy may be triggered and thereby afford coverage for the value of such damage. Harleysville assumed the defense after October 2000 leaving in dispute defense costs incurred by the insured between December 1999 and October 2000.

The district court applied Delaware's "four corner" principle to find that the Pinkerts' allegations of shoddy workmanship directed against Brosnahan Builders did not trigger a duty to defend and that even if extrinsic evidence (to the complaint) proffered by Brosnahan Builders were considered, the insured's potential liability was for the uninsured costs of correcting poor workmanship – not one for accidentally caused injury to persons or property. This insurance coverage issue (which is common to the field of construction defect litigation) was fully briefed before the district court and the Third Circuit panel; *en banc* review by the Third Circuit was denied.

Dissatisfied with the adverse rulings, Petitioner, in blistering fashion, accuses the lower courts of having failed to consider its arguments and evidence – proclaiming the correctness of its insurance coverage position to be self-evident. While petitioner's outcry of disbelief at the court's rulings may reflect a dogged commitment to the case, the petitioner's plea for the granting of certiorari is that the lower courts misapplied Delaware law or that the text of the courts' opinions are demonstrative of cursory judicial review warranting this Court's exercise of its inherent

supervisory powers over the federal courts. Having chosen to institute this diversity action in federal court and not in the Delaware state courts, the petitioner seeks to invoke certiorari on a purely state law issue under the veil of an argument that the lower courts misapplied Fed. R. Civ. P. 56.

The lower courts correctly applied the governing standard for summary judgment under Fed. R. Civ. P. 56 and held that, as a matter of law, the *Pinkert* Complaint did not trigger a defense obligation. Simply contending that summary judgment was incorrect under Rule 56 because of Petitioner's misguided view as to the legal significance of extrinsic evidence proffered in support of its demand for a defense, does not satisfy the criteria for the granting of certiorari. *See* U.S. Sup. Ct. R. 10(a).

There is no conflict between the Third Circuit's decision in this matter and that of any other United States Court of Appeals. Petitioners have presented no evidence that the Third Circuit decision conflicts with a Delaware Supreme Court decision on a federal question; nor have they shown that the Third Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. U.S. Sup. Ct. R. 10(a). There is no constitutional or federal question presented; the issues raised in this matter are purely questions of state law interpretation which do not warrant review by this court. U.S. Sup. Ct. R. 10(c).

While Harleysville maintains that it had no duty to defend Brosnahan Builders in the underlying action[2], Petitioner proffers

2. Harleysville did not have a duty to defend Brosnahan Builders because the allegations in the *Pinkert* Complaint did not include claims for an "occurrence" resulting in "property damage" as these terms are defined by the CGL policy. Alternatively, Harleysville had no obligation to defend the Brosnahans by operation of Exclusions k(5), k(6), m and/or n.

its view of a legal error based on the application of the well-established state law principles of insurance contract interpretation – which is neither a new area of law nor an area wrought with conflict.

Throughout their Petition, Brosnahan Builders assert that the Third Circuit must not have read Petitioners' brief because "no fair-minded observer with any grasp of the issues could harbor such sentiments." Petition at 20. Certainly, this is not the first time a petitioner has sought review from this Court based on his/her belief that no "fair-minded observer" could have ever found against him/her – but that is hardly a sufficient reason to grant a petition for a writ of certiorari.

Petitioner focuses particularly on its belief that a December 1999 letter authored by its counsel to Harleysville indicated that for at least some of the work performed on the Pinkerts' home, subcontractors were used and that the court supposedly disregarded the significance of the letter.[3] The *Pinkert* Complaint was silent as to whether subcontractors were employed on the project. The lower courts applied Delaware state law which requires that a court look solely to the allegations of the complaint filed against the insured and compare the terms of the insurance policy in determining whether a duty to defend exists.

The lower courts correctly held that counsel's December 1999 letter did not create a duty to defend because it was extrinsic evidence to the complaint; under Delaware law, extrinsic evidence is not admissible in determining whether an insurer has a duty to defend. *See Alexis I. DuPont School District, supra.*

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3. The issue of whether a subcontractor was used by the insured is pertinent to the potential applicability of an exception to the "your work" exclusion which removes liability coverage for "property damage" or arising out of "your work".

Petitioner challenges the lower court's conclusion that Harleysville was free to ultimately settle the tort action and thereby indemnify its insured without waiving its right to contest a defense obligation prior to its assumption and control of the defense subsequent to October 2002. The court based this conclusion, in part, on the fact that Harleysville issued to the insured a reservation of rights letter and entered into a "non-waiver" agreement with the policyholder, thereby preserving its right to assert any defense to coverages. Petitioner contends that the lower court failed to consider their contention that the non-waiver agreement was procured by "fraud", a hyperbole which petitioner asserts was undisputed. The supposed "fraud" is that the letter accompanying the non-waiver agreement suggested that Harleysville required the policyholder's signature whereas the company would have continued to investigate the loss even if the insured chose not to sign the agreement.

Whether the insured was misled or confused as to the significance of signing a non-waiver agreement is immaterial to the insurance coverage inquiry — a contract based analysis — and did not merit much, if any consideration, by the lower courts let alone the United States Supreme Court. In addition, even if the non-waiver agreement were infirm (which Harleysville denies), Harleysville reserved its right to contest coverage in no less than four subsequent reservation of rights letters to the policyholder. There is simply no question or doubt, and the two lower courts properly decided, that Harleysville sufficiently reserved its right to challenge its duty to defend under the policy, regardless of whether the policyholder was induced to sign a non-waiver agreement.

Petitioners also seek a writ of certiorari based on their claim that the lower court's holding has some far-reaching implication that an insurance company will no longer have a duty to defend

a policyholder "where an accident was caused by a human." Petition at p. 5. This is a mischaracterization and gross exaggeration of the lower court's holding. Petitioners have focused on the district court's statement: "The situation that led to the damage to the Pinkerts' home was clearly within the control of the plaintiffs, as general contractor of the construction project, and not a fortuitous circumstance happening 'without human agency.'" Petition at 23a.

The "human agency" concept refers back to the court's earlier citation to the Black's Law Dictionary definition of an "accident", which states: "an accident is an event happening without human agency or, if happening through such agency, an event, which under circumstances, is *unusual* and not expected by the person to whom it happens." Petition at 22a. Petitioners extrapolate from this statement that any claim of negligence caused by an individual must not be an "occurrence" under the insurance policy to trigger liability coverage; however, it is quite clear from the district court's opinion that this extrapolation is unjustified.

Relying on the definition of "accident" provided by *Black's Law Dictionary*, the district court's solitary reference to "human agency" simply states that although an accident may be the product of human error, shoddy workmanship alone which must be corrected at the expense of one party to the contract is not, either in ordinary parlance or insurance coverage case law, an accidental event. Accidents require the confluence of chance events which result in an injury, which can be foreseeable (with hindsight) or entirely unexpected.

While the district court phrased its holding in terms of whether the damages were caused "without human agency" (referencing the first part of the *Black's* definition of "accident"), the court's holding that the damages were caused by events entirely within

the Brosnahan Builders' control (at least according to the complaint) expressed the same governing principle that the construction deficiencies with the Pinkert residence were not the result of a chance, unusual event.

The district court's holding does not create new law nor does it have any far-reaching implications. To the contrary, the holding that there is no "occurrence" or "accident" when a general contractor fails to perform its contractual obligations is well-established law. *See* footnote 1, *supra*.

Petitioners had ample opportunity at the summary judgment stage, through their motion to amend the judgment, their appeal to the Third Circuit and their request for Third Circuit *en banc* review, to present their factual and legal contentions. Due process implications are not at issue simply because a court does not attach the same significance to proffered evidence as does a party. This petition does not invoke any *bona fide* question of infringement of due process rights nor any challenge to the integrity of the judicial process in this case. Brosnahan Builder's petition is merely about a disillusioned party looking for yet another opportunity to argue their position regarding the existence of insurance coverage. While Petitioners may be in disbelief that their position as to coverage has not been accepted by any court reviewing their claim, this does not mean that there is a flaw in the judicial system or that their claims have been deprived of meaningful review.

While Petitioners attempt to overstate the implications of the district court's and Third Circuit's holdings, the underlying opinion reveals that the courts merely affirmed the well-established concept that a general liability insurance policy does not provide insurance coverage for claims of breach of contract based on shoddy workmanship.

Because the only possible question raised by the Petitioners involves the application of state law to the given set of facts, Harleysville respectfully requests that this Honorable Court deny Brosnahan Builders' Petition for a Writ of Certiorari.

II. The Third Circuit Decision Does Not Conflict With The Ninth Circuit Decision In Travelers Indemnity

Petitioners erroneously assert that this Honorable Court should review the Third Circuit's decision based on the assertion that it conflicts with an unpublished Ninth Circuit case. Petition at 16, 17. Even the most cursory review of these two decisions reveals there is no conflict between the holdings.

In *Travelers Indemnity Co. of Illinois v. Insurance Company of North America*, No. 98-56276, 2000 U.S. App. LEXIS 4114, 2000 WL 278390 (unpublished) (9th Cir. March 14, 2000)[4], the question before the Ninth Circuit was whether an excess insurer, INA, was required – under the express terms of its insurance policy – to contribute to the defense costs incurred by a primary insurer, Travelers, in three underlying actions here INA initially disclaimed coverage but later participated in the settlement of the cases. INA's insurance policy specifically provided that INA was obligated to defend after the retained limit of $100,000.00 (the self insured limit under the policy) was exhausted. Because the settlements exceeded $100,000.00, a duty to defend was triggered under the insurance policy.

Petitioners erroneously argue that this Ninth Circuit decision stands for the proposition that an insurer that participates in a settlement is required under the principles of equity to contribute to the insured's defense costs or that an insurer that funds a

4. In accordance with Ninth Circuit rules, the opinion may not be cited for precedential value. *See* Ninth Circuit Rule 36-3.

settlement waives its right to contest a defense obligation. This argument is incorrect. The Ninth Circuit's reference to the "equity" of requiring INA to contribute to the defense costs lies in the basis of the claim before that court: namely, Travelers sought *equitable* contribution from INA for the defense costs.

The *Travelers Indemnity* case did not involve a claim by the policyholder for a defense; rather, one insurer provided a defense and sought contribution from another. Moreover, the Ninth Circuit did not make any blanket statement to indicate that when an insurer participates in a settlement, equity dictates that it also contribute to the defense costs; rather, under the express terms of the insurance policy, the Ninth Circuit determined INA had a duty to contribute to the defense costs. The *Travelers Indemnity* did not address any issue of waiver.

The unpublished Ninth Circuit decision in *Travelers Indemnity* does not even address the issues decided by the Third Circuit let alone conflict with the decision. Further, *Travelers Indemnity* is a diversity jurisdiction case based on the application of California law; the *Brosnahan Builders* case rests on the application of Delaware law.

Accordingly, there is no conflict between the Third Circuit's decision in the present action and the Ninth Circuit's unpublished decision in *Travelers*. As such, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the reasons articulated above, Respondent, Harleysville Mutual Insurance Company, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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